Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-656

MICHAEL J. MANCHESTER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. ____

MICHAEL J. MANCHESTER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Michael J. Manchester respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 4, 1979.

OPINION BELOW

There was no opinion as such issued by the Court of Appeals. Its judgment order, not yet reported, appears in the Appendix hereto. In addition, the

memorandum opinion rendered by the District Court for the Eastern District of Pennsylvania is also included in the Appendix hereto. This memorandum opinion has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 4, 1979. A timely petition for rehearing was denied on September 28, 1979 and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The central aim of Title IX of the Organized Crime Control Act of 1970 is to prevent and punish the financial infiltration and corrupt operation of legitimate businesses affecting interstate commerce. Section 1962 of Title 18 prohibits certain conduct and Section 1961 defines the terms used to describe the conduct so prohibited. The questions presented are:

I. May Section 1962(c) be applied to a person who joins with other entities to form an "enterprise" as defined in Section 1961 which has no legitimate object but rather is devoted exclusively to criminal activities?

II. May an individual who is one of the entities which together comprise an "enterprise" also be a person "associated" with that "enterprise" and simultaneously be a conspirator with the "enterprise"?

III. Was the evidence sufficient to sustain the verdict on each and every count?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:
Sections 1961, 1962 — text in the Appendix
United States Code, Title 18:
Section 1341 — text in the Appendix
United States Code, Title 26:
Section 7206(1) — text in the Appendix

STATEMENT OF THE CASE

Petitioner was convicted by a jury at a trial presided over by the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania of racketeering [18 U.S.C. 1962(c)], racketeering conspiracy [18 U.S.C 1962(d)], mail fraud [18 U.S.C. 1341] and filing a false corporate income tax return [26 U.S.C. 7206(1)]. In essence, the jury found petitioner guilty of joining with a group of others to bribe a Pennsylvania Department of Transportation (hereinafter PENNDOT) employee to foster the sale of the various kinds of traffic control equipment which petitioner and the others sold. In addition, petitioner was convicted of filing a false income tax return for Rad-O-Lite of Philadelphia, Inc. (hereinafter Rad-O-Lite), a corporation for which he was the chief operating officer as well as a part owner.

Originally, petitioner and Rad-O-Lite had been indicted together with six other defendants on the racketeering indictment, 78-281. Prior to trial, all of these six defendants plea bargained with the Government and so disposed of their cases.

Petitioner and Rad-O-Lite were brought to trial on 78-281, and a three-count tax charge indictment, 78-284 in which petitioner alone was named as a defendant, was consolidated with it for trial. Petitioner was named as a defendant in four of the counts in

78-281 and all three of the counts of 78-284. The jury convicted him of three of the four counts on 78-281 and all three of the counts on 78-284. A post-trial motion for judgment of acquittal was granted by the District Court on two of the three counts of 78-284 — otherwise, the post-trial motions were denied.

Factually, this was a very complex and confusing case.

As to the racketeering indictment, 78-281:

This indictment essentially charged that one Joseph Barszowski, a career PENNDOT employee, who was an assistant traffic engineer in the PENNDOT office for Southeastern Pennsylvania referred to as District Six, was the ringleader of a scheme in which certain distributors, producers, subcontractors and sales representatives obtained his aid in having items of traffic safety equipment specified or required in PENNDOT traffic safety improvement projects in return for which Barszowski was given money and other things of value by them. For all practical purposes, Barszowski ran District Six — no project could be completed without his approval and no one was paid for traffic signal work unless Barszowski approved such payment.

Petitioner was the Vice-President and chief executive officer of Rad-O-Lite. Among Rad-O-Lite's products was a form of traffic safety equipment known as the Rad-O-Lite pre-emption device and a component of that device which was known as the Rad-O-Lite pre-emption chassis. Rad-O-Lite's pre-emption equipment is a traffic control system whereby the operator of an emergency vehicle can, when approaching an intersection controlled by a traffic light, cause that traffic signal to turn green for him and red for all other traffic by simply activating a device in the emergency vehicle. The Rad-O-Lite pre-emption chassis is a metal container with wiring which is mounted inside traffic signal controller boxes and is intended for the purpose of

holding or mounting the Rad-O-Lite pre-emption device itself.

Sometime in 1971 or 1972, one Harry Weigand approached petitioner and asked if he could be the sales representative for Rad-O-Lite's pre-emption equipment. Weigand was then in the business of selling traffic signs, street signs and paint and in so doing dealt almost exclusively with municipalities, townships and boroughs, precisely the kind of entities which would be the purchasers of pre-emption equipment. Petitioner gave Weigand an exclusive distributorship of the Rad-O-Lite pre-emption equipment over an area which included PENNDOT's District Six. Apparently, immediately after Weigand acquired the Rad-O-Lite distributorship he went to Barszowski and offered to split his comissions with Barszowski if Barszowski would help him to secure sales. Barszowski readily agreed and in fact sales were made and commissions were split.

Weigand also contacted one Homer Pireoff, a salesman for W. F. Keegan, Inc., another co-defendant, which company was itself in the traffic signal business although it did not sell pre-emption equipment, and made the same offer to Pireoff. Pireoff also agreed.

At Barszowski's direction, Weigand paid Barszowski's commissions not directly to Barszowski, but rather by check to another co-defendant, John F. Dallas. Further, Weigand testified that at one point a portion of the commissions for a particular sale were paid to co-defendants J. Vincent Egan, Jr. and Joseph V. Egan, III.

The crucial alleged criminal conduct occurred in connection with a Federal Government project known as the TOPICS Program which funded in large part the cost of upgrading traffic intersections within PENNDOT District Six. Because of the existence of this program, Barszowski caused to be inserted a specification for traffic control projects within his district

which required a pre-emption chassis and he caused the preparation of a PENNDOT specification for pre-emption chassis equipment that could only be met by Rad-O-Lite's product, although it did not specifically mention that product by name. This resulted in the sale of the Rad-O-Lite pre-emption chassis to contractors working on PENNDOT TOPICS projects in District Six. Most of these sales were made through W. F. Keegan, Inc., the distributor for producers of the controllers used on the TOPICS projects which included the Rad-O-Lite pre-emption chassis as part of the controller package which it offered to PENNDOT contractors.

As a result, approximately four hundred traffic intersections were upgraded and Rad-O-Lite sold approximately four hundred pre-emption chassis in connection with this program. The evidence indicated that the Government actually paid $1,600.00 per pre-emption chassis but that Rad-O-Lite only received $850.00 per chassis.

It was the Government's contention at trial that although petitioner did not directly participate in the bribes of Barszowski, he was aware of them and approved of them by permitting Barszowski to more or less direct the activities of Rad-O-Lite. In support of this proposition the Government produced evidence tending to show that Barszowski was a frequent visitor to the Rad-O-Lite facility; that petitioner attended meetings with Barszowski, Weigand and key employees of W. F. Keegan, Inc. where Rad-O-Lite business was discussed; that petitioner sent copies of some of Rad-O-Lite's business correspondence to Barszowski at his home address; that Barszowski helped petitioner to obtain a loan from one of the co-defendants, Joseph V. Egan, III, and that Barszowski acted as a messenger to repay the loans petitioner had made from Egan and from John F. Dallas; that Barszowski was present when petitioner relieved Weigand of his dis-

tributorship and that this took place approximately a week to ten days after Weigand had sent a Federal form 1099 to John F. Dallas reflecting the commissions which Weigand had paid to Dallas for Barszowski's benefit.

The Government also called several former employees of Rad-O-Lite. Two of them testified that petitioner told them that Barszowski was a silent partner in Rad-O-Lite; two of them testified that petitioner had made angry remarks to the effect that Barszowski was bleeding him dry and not doing very much in return; and two of them testified that each was told that they were not to recognize Barszowski should he appear at the Rad-O-Lite facility with his own PENNDOT superior.

On the other hand, Barszowski's immediate superior at PENNDOT testified and told the jury that he knew full well that Barszowski was a regular visitor to the Rad-O-Lite facility and the facilities of other companies in the traffic control business and that he would not have been the least bit surprised had Barszowski been recognized by the Rad-O-Lite employees.

Petitioner himself testified and flatly contradicted the testimony of the former Rad-O-Lite employees. Otherwise, in large part, he corroborated the factual testimony of the other Government witnesses although he testified contrary to the inferences the Government sought to be drawn from their testimony.

He freely admitted that he kept in close touch with Barszowski and kept him fully advised of Rad-O-Lite's activities concerning the TOPICS projects. He explained that he did this because Rad-O-Lite from its inception was in dire financial straits and it was very important that Rad-O-Lite's bills be paid as promptly as possible and only Barszowski had the power to cause the payment of any particular bill.

Finally, it is quite clear from the evidence that a number of persons knew that Barszowski was receiv-

ing bribe money — among them were Weigand, Pireoff, J. Vincent Egan, Jr., George McFadden the controller and treasurer of W. F. Keegan, Inc. and, of course, Barszowski himself. Each of these persons testified either under grant of immunity or after a plea bargain had been arranged with the Government and not one of them testified that petitioner knew of the bribe payments.

As to the tax charges, indictment 78-284:

The one count now remaining charged petitioner with having knowingly and willfully filed a corporate income tax return for Rad-O-Lite which was false in that it understated income and over-stated interest deductions.

The evidence here indicated that there was some $38,000.00, represented by four checks, which was not included within the total amount of money reported. There was evidence from petitioner's accountant that the reason why these four checks were not included was because he had mistakenly assumed that they had been included in the corporation's prior fiscal year return. The total income reported on the return involved in this count was $359,067.00. Petitioner's accountant further testified that the omission of the $38,000.00 would have had absolutely no effect on the tax liability of anyone due to losses in prior years which could be carried forward. On the other hand, an I.R.S. agent testified for the Government that the omission of the $38,000.00 would have had an effect on the tax liability. It should be noted that there was no testimony whatsoever about the alleged over-stated interest deduction.

REASONS FOR GRANTING THE WRIT

1. The Decision below conflicts with a Decision of the United States Court of Appeals for the Sixth Circuit as to the proper interpretation of 28 U.S.C. 1961 and 1962.

It is clear that if petitioner violated the federal racketeering statute at all, it is because he became one of the entities that comprised an "enterprise" which conducted its affairs through "a pattern of racketeering activity." It is equally clear that the enterprise here involved was convened, in the language of the indictment, "for the purpose of corruptly influencing and seeking to influence the administration of traffic safety improvement projects in PENNDOT District Six by means of bribery and fraud and the concealment thereof." Thus, the question arises, as phrased by the United States Court of Appeals for the Sixth Circuit in *United States v. Sutton*, ___ F.2d ___ (Slip Opinion of September 4, 1979 at number 78-5134), "The question in this case is whether the statute may also be applied to persons engaged in racketeering activity unrelated to any legitimate organization but in furtherance of something the government terms 'a criminal enterprise'."

The Sixth Circuit answered the question in the negative holding that the word "enterprise" as used in the statute necessarily means an enterprise created for a lawful purpose. Their specific language at page 16 of the Slip Opinion is

> "We therefore hold that an 'enterprise' within the meaning of the statute is 'any individual, partnership, corporation, association . . . and any union or group of individuals associated in fact,' that is organized and acting for some ostensively lawful purpose, either formally declared or informally recognized. Section 1962 (c) is violated

whenever any person associated with such an enterprise conducts its 'affairs', i.e., undertakes any activity on behalf of or relating to the purposes of the enterprise, by committing at least two criminal acts constituting a 'pattern of racketeering' as defined in Section 1962(5)."

In the case at bar, the Third Circuit, since it affirmed the judgment of the District Court, has held that an "enterprise" organized for an unlawful purpose is also prohibited by this statute. Thus, there is a clear conflict between the Sixth Circuit and the Third Circuit. Further, it would appear that the Third Circuit's view is shared by the Second, Fifth, Sixth and Ninth Circuits as well. *Sutton, supra* at page 4.

2. The Statute involved is not invoked on infrequent and isolated occasions but rather is used regularly by United States Attorneys across the country and hence the proper interpretation of this Statute is a matter of vital import to a great number of persons.

We believe and so respectfully submit that whenever a regularly invoked federal criminal statute is interpreted in a non-uniform basis so that a person who lives in one part of the country might go to jail for conduct which in another part of the country is not considered criminal at all, this Court should resolve the differences in interpretation to achieve uniformity. It simply should not be that someone who lives in Philadelphia, Pennsylvania might go to jail for conduct which would not even support a prosecution if that person had lived in Cincinnatti, Ohio. We submit that justice is not justice unless applied evenhandedly and such is not presently the case with reference to this statute.

3. The Decision below incorrectly interprets Section 1961 and 1962 in defining "Enterprise" and so extends the scope of the Statute well beyond that intended by the Congress.

It has been said that the primary thrust of Section 1962 is directed towards the protection of existing businesses engaged in interstate commerce from infiltration of elements of organized crime, from being used as vehicles for laundering the proceeds of organized crime activities, and from being perverted to methods of operation commonly associated with organized crime. See *United States v. Fineman,* 434 F. Sup. 189 (E.D. Pa. 1977).

We submit this case certainly does not present a situation involving organized crime in any generally accepted use of that term. Petitioner and his company were engaged in legitimate business — exactly the kind of persons the racketeering act was designed to protect, not prosecute.

For purposes of this petition, we submit the decision of the Sixth Circuit in *United States v. Sutton, supra,* and the reasoning therein contained to support the proposition that the Court below has erroneously construed "enterprise" in Sections 1961 and 1962 to include a grouping together of persons whose sole object is an unlawful purpose.

This Court should grant certiorari to correct this error.

4. The Decision below is arguably in conflict with a decision of this Court.

While we do not concede that the evidence adduced at trial was sufficient for the purpose, we suggest that the absolute outer limits of the jury's finding would have been that petitioner at some point during the

period covered by the indictment learned of the scheme to bribe Barszowski. But we submit that even if it be granted that petitioner had knowledge, the evidence is totally devoid of any activities of petitioner which indicated an intent to further that unlawful scheme. To the contrary, petitioner's entire activities as reflected in the record are totally consistent with a reasonable businessman's attempts to further his business. We invite your attention to your decision in *Direct Sales v. United States*, 391 U.S. 703, 63 S. Ct. 1265 (1943). We submit that this decision supports the proposition that even if it be found that at some point petitioner became aware that Barszowski was getting a cut on commissions on the sale of Rad-O-Lite products, no criminal liability could attach to petitioner unless he thereafter performed acts intended to benefit Barszowski as opposed to acts intended to benefit Rad-O-Lite and himself with the incidental effect of benefiting Barszowski and we submit that on this record there is no such evidence.

5. This Court should not permit a conviction to stand which convicts an individual who is one of the entities which together comprise an "Enterprise" to be in violation of both Sections 1962(c) and 1962(d).

We submit that the evidence in the case at bar, if it shows any criminal conduct on petitioner's part at all, shows that petitioner did whatever it is he did, not as an independent operator but as a part of a group of persons — as a member of an "enterprise." And so we submit that if petitioner was associating with an enterprise engaged in activities which affected interstate commerce through a pattern of racketeering activity, the crime created and prohibited by 1962(c), then he certainly could not be a conspirator with those persons with whom he was associated for that unlawful purpose, the crime created and prohibited by 1962(d).

In the Court below, the Government asserted that this argument fails because the statutory definition of 1962(c) does not contain an element of agreement or concerted activity and that it makes it unlawful for "any person" to conduct an enterprise affecting interstate or foreign commerce through a "pattern of racketeering." We concede that such is the language of Section 1962(c) — but while under the statutory definition it may well be possible for a single person to commit the offense, the evidence in the case at bar, shows, if any criminal conduct at all, conduct as a part of the enterprise.

In essence then, the Government seeks to give two different labels to what can only properly be considered as a single course of action by petitioner. We submit that it is therefore improper to convict him of two different crimes and subject him to the possibility of separate and consecutive prison terms for the two different offenses.

6. This Court should grant Certiorari for the reasons stated above. But, having granted Certiorari, it should review the evidence to determine if it was sufficient to sustain each of the verdicts in order to do justice to this particular petitioner as well as settle the law for other persons in his position generally.

We believe that there was woefully insufficient evidence to sustain a conviction on any of the counts involved in the two indictments in this case. In particular, we believe that there is absolutely no evidence to show criminal conduct in connection with the remaining count of the tax indictment, count 2 of 78-284. We confess that this aspect of the case does not involve, to the best of our knowledge, any novel principal of law. But petitioner is completely convinced that with par-

ticular reference to the tax charge, the verdict of the jury below was woefully erroneous. We respectfully submit that if this Court believes that certiorari should be granted in order to determine the proper construction of the racketeering statute and thus accomplish a benefit for an untold number of persons, it is only fitting that the one person who brought the matter to the attention of this Honorable Court should be afforded a complete review of his own case.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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Dated: October 19, 1979

Appendix

JUDGMENT ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1334 and 79-1335

UNITED STATES OF AMERICA

v.

MANCHESTER, MICHAEL J.,
Appellant in No. 79-1334

(D.C. Crim. No. 78-00281-06)

UNITED STATES OF AMERICA

v.

MANCHESTER, MICHAEL J.,
Appellant in No. 79-1335

(D.C. Crim. No. 78-00284)

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
September 4, 1979
Before: ALDISERT, ROSENN and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the federal racketeering statute was not intended to apply to the instant situation, (2) the charge of racketeering and the charge of racketeering conspiracy are mutually exclusive on the facts of this case, (3) the racketeering charge fails because there was not alleged nor proved at least two acts of racketeering activity, (4) the mail fraud charge fails because there was no proof of an intent to devise or intend to devise a scheme to defraud, (5) the government committed prejudicial error by introducing against appellant other crimes both by cross-examination of appellant himself and by direct examination of other witnesses, (6) the trial court committed reversible error in refusing to strike certain testimony, (7) the evidence was not sufficient to sustain the verdict on any count, and (8) the trial court did not apply the proper standard of review in considering appellant's post-trial motions, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ R. J. ALDISERT
Circuit Judge

Attest:

/s/ Thomas F. Quinn, *Clerk*
Dated: September 4, 1979

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1334 and 79-1335

UNITED STATES OF AMERICA

v.

MANCHESTER, MICHAEL, J.
Appellant in No. 79-1334

UNITED STATES OF AMERICA

v.

MANCHESTER, MICHAEL, J.
Appellant in No. 79-1335

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of

the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ R. J. ALDISERT
Circuit Judge

Dated: September 28, 1979

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	Crim. No. 78-281
MICHAEL J. MANCHESTER and	:	78-284
RAD-O-LITE OF PHILADELPHIA,	:	
INC., a/k/a PRE-EMPTION	:	
DEVICES, INC.	:	

MEMORANDUM OPINION AND ORDER

WEINER, *J.* February 21, 1979

Presented to the court are the post-trial motions of the defendants, Michael Manchester and Rad-O-Lite of Philadelphia, Inc., a/k/a Pre-Emption Devices, Inc., for judgment of acquittal or in the alternative for new trial. The defendant Manchester was convicted by a jury in Criminal Number 78-281 of one count of racketeering, one count of conspiring to racketeer, and one of two counts of mail fraud, and in Criminal Number 78-284 of two counts of subscribing to false tax returns and one count of aiding and assisting in the preparation of a false tax return. The defendant Rad-O-Lite of Philadelphia, Inc. was convicted in Criminal Number 78-281 of conspiring to racketeer. The defendants have assigned various grounds in support of their motions.

Defendants have made a general argument concerning the sufficiency of the evidence, and technical arguments regarding the applicability of the "RICO" statutes, 18 U.S.C. §1961 *et seq.*, the mutual exclusiveness of 18 U.S.C. §§1962(c) and 1962(d), the government's failure to allege and prove at least two acts

of racketeering activity, and the government's failure to prove intent to devise a scheme to defraud within the meaning of the mail fraud statute. For the reasons to follow we deny the defendants' motions.

The defendants were indicted with seven other named defendants. Prior to trial, all of the co-defendants except defendants Manchester and Rad-O-Lite of Philadelphia, Inc. pleaded guilty to one or more of the counts charged in the indictment.

At the trial of Manchester and Rad-O-Lite, the government called nineteen witnesses in its case in chief, and called one of those again in rebuttal. After the denial of defendants' motion for judgment of acquittal, the defendants presented their defense.

The case involved a complex scheme resulting in the knowing and intentional payment of money and other things of value to co-defendant Joseph Barszowski, an assistant district traffic engineer employed by the Pennsylvania Department of Transportation ("Penndot"), to bribe Barszowski so as to induce him to use his influence and the power of his position to assist in the sale of defendants' pre-emption device.

The defendants filed motions for a new trial and/or for judgment of acquittal. Rule 33 of the Federal Rules of Criminal Procedure allow a new trial "if required in the interest of justice." The federal courts are in agreement that a motion for a new trial is directed to the sound discretion of the trial court after it has weighed the evidence and considered the credibility of the witness. *United States v. Dabney*, 393 F.Supp. 529 (1975).

In considering a motion for judgment of acquittal:

> ". . . The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government . . ." Gilasser v. United States, 315 U.S. 60, 80 (1942)

In reviewing the evidence introduced at trial, we are

precluded from assessing the credibility of witnesses and must instead determine whether all the evidence against the defendants, taken as a whole, is sufficient to permit reasonable jurymen to find defendants guilty beyond a reasonable doubt. If we can reach that conclusion, the defendants' motion must be denied.

The defendants raise many arguments in support of their motions, which we shall address individually. Initially, the defendants argue that the thrust of the Federal Racketeering statute is directed toward the protection of existing businesses engaged in interstate commerce from activities of persons involved in "organized crime." The defendants, however, have not cited any authority for this proposition. Instead, the defendants argue that those situations which were held to be covered by the "RICO" statutes, but which did not involve organized crime, were incorrectly decided. The defendants also assert that the intent of Congress was to limit the applicability of the "RICO" statutes to organized crime situations. While we agree that Congress intended to deter the influence of "organized crime" by 18 U.S.C. §1961 *et seq.*, that does not preclude it's application to this case which does not concern "organized crime." The decision in *United States v. Fineman*, 434 F.Supp. 189, 197 (E.D. Pa. 1977) resolved the defendants' claim wherein it said:

> That these considerations formed the principal motive for the actions taken by Congress is apparent from the Congressional statement of purpose, as well as from the legislative history. But criminal statutes are necessarily directed at actions, not at individuals. The Congressional response was to make certain patterns of activity punishable as federal crimes, whoever may commit them. If the defendant's conduct can be shown to fall within the range of activities forbidden by the express language of the statute, it is not within the province of the Court to create an exception, merely

> because a strong argument can be made that the Congressional purpose might have been accomplished by a more narrowly drawn statute.

Secondly, the defendants argue that counts one and two of the indictment are mutually exclusive and therefore that it is legally impossible for Manchester to have been found guilty on both charges. We do not agree, as we find the defendant Manchester was convicted of two separate sections of 18 U.S.C. §1962 which delineate distinctly different unlawful actions. Section 1962(c) is directed at the defendant Manchester being a member of and being associated with an "enterprise" that was conducted in such a manner that it affected interstate or foreign commerce through a "pattern of racketeering activity." The defendant Manchester could have been found to have been a member of such an "enterprise" without any evidence showing that he agreed or contracted to take part in the illegal activity. Section 1962(d) makes it a crime to conspire to carry out the substantive crime established in §1962(c). Conspiracy to commit a crime is an offense different and apart from the offense which may be the purpose of the conspiracy, and even if the substantive offense was committed in the course of carrying out the objectives of the conspiracy, there is no merger of offenses. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Sections 1962(c) and (d) contain separate and distinct crimes. Consequently, a defendant can be convicted of violating each section.

The defendants further argue that the government failed to prove Manchester's involvement in at least two acts of racketeering as is required for a racketeering conviction under 18 U.S.C. §1961(5). The government proved one act of mail fraud and Manchester's violation of the Pennsylvania Bribery Statute — a second act of racketeering. Hence, this claim is without merit.

The defendants contend that there was insufficient evidence for the jury to convict Manchester of mail fraud under 18 U.S.C. §1341 because the letter he sent, and upon which the government's case rests was not shown to have been in furtherance of a scheme to defraud. In view of the fact that the recipient of the letter, who was an employee of the defendants at the time of receipt, testified that the contents of the letter referred to the underlying conspiracy with and bribery of Barszowski, we find no merit in the defendants' contention. On the basis of the testimony and the letter itself, the jury had ample evidence to find that the object of the letter was to further the scheme to defraud Penndot and the public, and to return a conviction therefor.

Finally, the defendants argue in support of their motions that the evidence presented by the government was insufficient to support the verdict. We disagree. The well established standard employed in considering allegations of insufficient evidence for the jury verdict is one of viewing all the evidence in a light most favorable to the government, *Hamling v. United States*, 418 U.S. 87, 124 (1974); *United States v. Goichman*, 407 F.Supp. 980 (1976), while leaving the question of credibility of the witnesses to the jury. *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978); *United States v. Greenlee*, 517 F.2d 899 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).

Under these standards, the government proved the violations sufficiently for the jury to find that the defendants committed the crimes they were convicted of. The government's evidence presented at trial included direct testimony of the defendants' knowledge of co-defendant Barszowski's acceptance of bribes in exchange for favors, and of Barszowski's financial interest in Rad-O-Lite. Direct evidence also brought out the existence of a "silent partnership" between Barszowski and the defendant Manchester, and re-

peated statements of Manchester to the effect that Barszowski was getting more out of the defendants than he was producing, which was to the extreme detriment of the defendants. Further evidence of the defendants' knowing involvement in the racketeering scheme came from the letter the defendants sent to an employee which spoke of Barszowski as a colleague involved in the scheme to require the inclusion of preemption chassis in Penndot traffic safety contracts and to bribe Barszowski.

From this and additional evidence, we conclude that the government produced sufficient evidence to warrant the jury's finding that the defendants are guilty. The government joined with the defendant Manchester for judgment of acquittal on counts 1 and 3 of Criminal Case 78-284. Therefore we deny the defendants' motions for a new trial and their motion for judgment of acquittal, except as to counts 1 and 3 of Criminal Case 78-284 of which judgment of acquittal is granted.

TEXT OF TITLE 18
UNITED STATES CODE, SECTION 1961

Title 18 U.S.C., Section 1961.

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section

501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465.

TEXT OF TITLE 18
UNITED STATES CODE, SECTION 1962

Title 18 U.S.C., Section 1962.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a

pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.

TEXT OF TITLE 18
UNITED STATES CODE, SECTION 1341

Title 18 United States Code, Section 1341.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

TEXT OF TITLE 26
UNITED STATES CODE, SECTION 7206(1)

Title 26 United States Code, Section 7206(1)

Any person who—

(1) **Declaration under penalties of perjury.**—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A. Stat. 852.

Supreme Court, U. S.
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No. 79-656

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL J. MANCHESTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 17-19) is listed at 605 F. 2d 1198 (Table). The memorandum opinion and order of the district court (Pet. App. 22-27) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A petition for rehearing was denied on September 28, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" that affects interstate commerce and is conducted through a pattern of

racketeering activity, extends to illicit as well as legitimate enterprises or requires a showing that a defendant is connected with "organized crime."

2. Whether a person may be convicted both of a substantive racketeering offense, in violation of 18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d).

3. Whether the evidence was sufficient to sustain petitioner's convictions.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of participating in the affairs of an enterprise conducted through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), one count of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), one count of mail fraud, in violation of 18 U.S.C. 1341, two counts of subscribing to a false income tax return, in violation of 26 U.S.C. 7206(1), and one count of aiding or assisting in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2).[1] Petitioner was sentenced to concurrent terms of six months' imprisonment on the substantive

[1]The jury acquitted petitioner on one count of mail fraud. Following the verdict, the government acquiesced in petitioner's motion for judgment of acquittal on two tax counts (Pet. App. 27). In all other respects, the district court denied petitioner's post-trial motion for judgment of acquittal or a new trial (*ibid.*).

Prior to trial, five of petitioner's co-defendants pleaded guilty to one or more counts. A corporate co-defendant, Rad-O-Lite of Philadelphia, Inc., was charged with one count of conspiracy, in violation of 18 U.S.C. 1962(d). Rad-O-Lite was convicted at a joint trial with petitioner and was sentenced to a fine of $5,000. Rad-O-Lite took a separate appeal and is not a petitioner in this case.

racketeering count and the tax count. Imposition of sentence on all other counts was suspended.

1. Petitioner was the chief executive officer and part owner of Rad-O-Lite of Philadelphia, Inc. The company produced what is called a "preemption device"—a traffic control system that enables the operator of an emergency vehicle to cause traffic signals to turn green for him and red for all other traffic by activating a radio device in the emergency vehicle (Pet. 3-4). Joseph Barszowski was an assistant traffic engineer in the Pennsylvania Department of Transportation ("PENNDOT"). Barszowski was assigned to the PENNDOT office for Southeastern Pennsylvania, known as District Six. "For all practical purposes, Barszowski ran District Six" (Pet. 4).

In brief, the evidence at trial showed that Barszowski, in return for large sums of money and other things of value, was the ringleader of a scheme to assist certain businessmen, including petitioner, to sell Rad-O-Lite's traffic safety equipment (Pet. 5-6). The scheme centered on the imposition of a requirement that traffic safety equipment, to be eligible for use in traffic safety improvement projects in District Six, must have a "preemption capability." This requirement was imposed only in District Six, where Barszowski was the final authority on specifications (A. 211a-229a, 245a).[2] Moreover, Barszowski designed this specification in such a way that it could be met only by Rad-O-Lite's product (A. 214a-217a; GX 318, 319). The scheme resulted in the sale of approximately 400 Rad-O-Lite preemption units

[2]"A." refers to the joint appendix filed in the court of appeals; "GX" refers to the government's exhibits in the district court. Because the record was not available to us in time to prepare this Brief in Opposition, the citations herein are taken from the government's brief in the court of appeals.

at a cost to PENNDOT of $1,600 apiece. Of this amount, approximately $850 per unit was paid to Rad-O-Lite (Pet. 6); the rest of the inflated price primarily represented excessive sales commissions received by co-defendant Harry Weigand (A. 138) and Barszowski's share of the sales, which alone amounted to $139,000 (A. 43-65; GX 158, 161, 165, 167, 171, 173, 178, 186, 191, 196, 201, 204, 208, 213, 216, 217, 219, 224, 226, 231, 233, 235, 239, 241, 244, 245, 250, 252, 253, 257, 260, 263, 266, 268). No Rad-O-Lite preemption unit was ever sold outside District Six (A. 129a-130a). Barszowski's ultimate plan was to initiate a "sales campaign" to have PENNDOT and various municipalities install completely functioning Rad-O-Lite preemption units throughout the state at an additional cost of between $2,500 and $3,200 per unit (A. 195a).[3]

2. The "enterprise" specified in the racketeering counts of the indictment was the group of individuals associated in fact "for the purpose of corruptly influencing and seeking to influence the administration of traffic safety improvement projects in PENNDOT District Six by means of bribery and fraud and the concealment thereof" (Pet. 9). In order to show that petitioner knowingly participated in this criminal enterprise, the government presented evidence that petitioner, the chief executive officer of Rad-O-Lite, told two employees of Rad-O-Lite that Barszowski was his "silent partner" and that "big

[3]This part of the scheme was thwarted by mid-1975 when PENNDOT headquarters in Harrisburg became aware of the significantly higher costs of traffic signal equipment in District Six than in other districts. An investigation revealed that a substantial portion of the excess cost resulted from the unique provision for preemption capability that Barszowski had written into the specifications for projects in District Six. The Harrisburg officials informed Barszowski that they would no longer pay for the installation of preemption equipment (A. 244a-248a; GX 321).

things" were going to happen to the company as a result (A. 83, 149a). Petitioner directed Rad-O-Lite's bookkeeper to send copies of invoices for sales of the preemption units to the home address of his "silent partner" (A. 134). In addition, blind copies of Rad-O-Lite's and petitioner's key correspondence were sent to Barszowski (A. 54-59, 136a-140a, 289a; GX 270, 272, 273, 885-887). Barszowski presided over meetings, held at Rad-O-Lite's office, of the individuals involved in the scheme (A. 188a), and Barszowski and petitioner conferred privately during these meetings on prices for Rad-O-Lite equipment (A. 189a). Barszowski also delivered to petitioner checks made payable to Rad-O-Lite for the preemption units (A. 189a, 280a), helped to expedite payments to Rad-O-Lite (A. 191a, 194a), and used his influence to obtain two large loans for petitioner (A. 193a, 198a, 286a-289a). These loans and petitioner's repayments were delivered through Barszowski (*ibid.*). On occasions when Barszowski came to the Rad-O-Lite office accompanied by other PENNDOT officials, petitioner instructed Rad-O-Lite employees to act as though they did not know Barszowski (A. 85, 114a). Petitioner also repeatedly complained to Rad-O-Lite employees about the large amount of money Barszowski was receiving from Rad-O-Lite and the minimal benefits the company had obtained in return (A. 84, 97, 113a).[4]

[4]On one occasion, petitioner said "[t]hat god damn Joe [Barszowski] is bleeding me dry and getting 10% while I am breaking my ass" (A. 84, 97). On another occasion, petitioner complained that Barszowski "and these other people are getting money out of us and we are struggling to make a living and have to pay the bills and everything else and they are doing very little for what they get" (A. 113a).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the decision below is in conflict with the recent decision of the Sixth Circuit in *United States* v. *Sutton*, 605 F. 2d 260 (1979), which held that the term "enterprise," as defined in 18 U.S.C. 1961(4) and employed in 18 U.S.C. 1962-1964, includes only legitimate businesses or operations and does not include associations or organizations established solely for unlawful purposes. However, petitioner never raised this issue of the scope of the term "enterprise" in the courts below, and therefore neither the district court nor the court of appeals addressed it. Having failed to present his argument to the lower courts, petitioner should not be permitted to raise it now for the first time in this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, as we recently informed this Court in connection with the pending petition for a writ of certiorari in *Little* v. *United States*, No. 79-5013 (a copy of our submissions in *Little* are being sent to petitioner), the Sixth Circuit has granted the government's petition for rehearing en banc in *Sutton* and has vacated the panel's decision. Accordingly, there is at present no conflict among the circuits on this issue, since every other court of appeals to have passed upon the question has concluded that 18 U.S.C. 1962 reaches illegitimate as well as legitimate enterprises that are conducted through a pattern of racketeering activity.[5] *United States* v.

[5]Moreover, each court of appeals to have addressed the question has held that the term "enterprise" encompasses governmental units. *United States* v. *Grzywacz*, 603 F. 2d 682 (7th Cir. 1979); *United States* v. *Frumento*, 563 F. 2d 1083, 1089 (3d Cir. 1977); *United States* v. *Brown*, 555 F. 2d 407, 415 (5th Cir. 1977).

Aleman, Nos. 78-1782 and 78-1783 (7th Cir. Oct. 30, 1979); *United States* v. *Rone*, 598 F. 2d 564 (9th Cir. 1979), petition for cert. pending *sub nom. Little* v. *United States*, No. 79-5013; *United States* v. *Swiderski*, 593 F. 2d 1246 (D.C. Cir. 1978), cert. denied, No. 78-6227 (Apr. 30, 1979); *United States* v. *Elliott*, 571 F. 2d 880, 896-899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Altese*, 542 F. 2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977).[6] And, for the reasons elaborated in our Brief in Opposition in *Little* v. *United States*, at 4-8, we submit that these decisions have correctly resolved the issue.

Petitioner also confuses (Pet. 11) the issue presented in *Sutton* with the question whether 18 U.S.C. 1962 reaches individuals who are not connected with "organized crime." Although petitioner did raise this latter question in the courts below, it was properly rejected (Pet. App. 19, 24-25). The language of the statute and its legislative history make plain, and the courts have uniformly agreed, that the statute is not restricted in application to the activities of "organized crime." See *United States* v. *Aleman*, *supra*, slip op. 6-7; *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Mandel*, 415 F. Supp. 997, 1018-1019 (D. Md. 1976), subsequent opinion, 591

[6]Moreover, even if there were a conflict in the circuits on this issue, this would be an unsuitable case in which to resolve the question. Aside from the fact that the issue was not raised or decided below, the case actually centers upon a legitimate business enterprise—Rad-O-Lite—conducted through a pattern of racketeering activity. There would be no *Sutton* question here at all had the indictment been cast in slightly different terms to define the "enterprise" as Rad-O-Lite rather than as the group of individuals associated for the purpose of corruptly influencing, by means of bribery and fraud, the traffic safety improvement projects in PENNDOT District Six (see page 4, *supra*).

F. 2d 1347 (4th Cir. 1979); 116 Cong. Rec. 18913-18914 (1970) (remarks of Sen. McClellan); *id.* at 35344 (remarks of Rep. Poff). See also *United States* v. *Culbert*, 435 U.S. 371, 374-380 (1978); Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes*, 69 J. Crim. L.C. & P.S. 1, 9-10 (1978). Petitioner offers no reason to doubt the soundness of this conclusion.

2. Petitioner next contends (Pet. 12-13) that he may not be convicted both of a substantive offense under 18 U.S.C. 1962(c) and of conspiracy to commit that offense under 18 U.S.C. 1962(d). In petitioner's view, these are merely "two different labels [for] what can only properly be considered as a single course of action" (Pet. 13). For the reasons stated in our Brief in Opposition in *Little* v. *United States*, at 9-12, this claim is without merit as a matter of statutory construction.

Nor is there any constitutional objection to the fact that Sections 1962(c) and (d) establish as separate offenses, and authorize cumulative punishments for, discrete acts that are part of "a single course of action by petitioner" (Pet. 13).[7] Congress is free, under the Double Jeopardy Clause, to define crimes and fix their punishment. See, *e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 69-70 & n.24 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). In particular, the Double Jeopardy Clause does not bar Congress from treating as separate offenses, subject to cumulative penalties, the commission

[7]We also note the abstract nature of any such claim in this case, since petitioner's sentence on the substantive racketeering count is concurrent with his sentence on the tax count and since petitioner received suspended sentences on all other counts, including the conspiracy count.

of a crime and a conspiracy to commit the crime. *Iannelli* v. *United States*, 420 U.S. 770 (1975).[8] As the Court held in *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946):

> It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U.S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U.S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses.

See also *Pereira* v. *United States*, 347 U.S. 1, 11 (1954).

3. Petitioner's final contention (Pet. 13-14) is that the evidence was insufficient to sustain his convictions. The courts below rejected this argument (Pet. App. 19, 26-27), and, as petitioner recognizes (Pet. 13), further review by this Court is unwarranted. See *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

In any event, petitioner's claim is insubstantial. With regard to the racketeering counts, as summarized above (pages 3-5, *supra*), petitioner's knowing and active involvement in the unlawful scheme was established by

[8]Since a single individual, without acting in concert with other persons, can conduct the affairs of an enterprise through a pattern of racketeering activities in violation of the statute, the double jeopardy issues alluded to in *Jeffers* v. *United States*, 432 U.S. 137 (1977), and presented in *Whalen* v. *United States*, No. 78-5471, argued November 27-28, 1979, are not presented here.

overwhelming evidence. With respect to the tax count,[9] the evidence showed that approximately $38,000 in income was not reported on Rad-O-Lite's federal income tax return for fiscal year 1974, that this $38,000 was attributable to four checks from petitioner's co-conspirators that were not entered in Rad-O-Lite's books for that year, that petitioner was the chief executive officer of Rad-O-Lite and had ultimate responsibility for its books and records, and that petitioner was generally involved with the books and the incoming payments on a day-to-day basis (A. 320a, 321a, 128a-129a, 143a). This evidence provided adequate grounds for the jury to convict petitioner and to reject his explanation of the $38,000 omission as an accounting error (Pet. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

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[9]Petitioner's sentence on the tax count is concurrent with his sentence on the racketeering count. In addition, petitioner is not eligible for parole because he was sentenced to a term of less than one year and the district court did not specifically provide for his release on parole under 18 U.S.C. 4205(a), (f). Thus, petitioner is unlikely to suffer any adverse consequences because of the tax count, and it is accordingly unnecessary for the Court to consider the sufficiency of the evidence to support that conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

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